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Federal Communications Commission

DA 98-936

DISPATCHED BY

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations.  
(Middlebury and Berlin, Vermont)

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MM Docket No. 98-72  
RM-9265

### NOTICE OF PROPOSED RULE MAKING

Adopted: May 13, 1998

Released: May 22, 1998

Comment Date: July 13, 1998

Reply Comment Date: July 28, 1998

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dynamite Radio, Inc. ("petitioner"), licensee of Station WGTK(FM), Channel 265A, Middlebury, Vermont, seeking the substitution of Channel 265C2 for Channel 265A; the reallocation of Channel 265C2 from Middlebury to Berlin; and the modification of Station WGTK's license to specify Berlin as its community of license. Petitioner states it will apply for Channel 265C2 at Berlin, if allotted.<sup>1</sup>

2. Petitioner seeks modification of Station WGTK's license pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties

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<sup>1</sup> Although petitioner's request indicates that the original copy of its proposal was signed, petitioner failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel must be signed and verified by the party and his/her address stated. In absence of such verification, the petition may be dismissed. Section 1.420(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, 5 FCC Rcd 3911, n.41 (1990). Therefore, petitioner is requested to rectify this omission in its comments.

an opportunity to file competing expressions of interest.<sup>2</sup> In support of its proposal, petitioner states Berlin is a community with a 1990 U.S. Census population of 2,561 persons. It submits the community has its own fire and police departments and local government. Petitioner states that medical services in Berlin are provided by the Central Vermont Medical Center and Berlin Family Health center and the children attend the Berlin Elementary School. Petitioner contends that the reallocation of Channel 265C2 to Berlin will further the goals of Section 307(b) of the Communications Act by providing the community with its first local service. Moreover, WGTV is limited to a power of 3 KW from its present transmitter site, thus petitioner argues that adoption of its proposal will enable Station WGTV to upgrade its facilities and increase its service area.

3. We believe petitioner's proposal warrants consideration since it could provide Berlin with its first local aural transmission service and will not deprive Middlebury of its only existing aural transmission service as it will continue to be served by AM Station WFAD. Nonetheless, since petitioner is an existing station that seeks to relocate its transmitter site there will be areas which will lose service as well as areas which will gain new reception service. With respect to evaluating proposals to change the community of license, the Commission has stated, "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weight independently against the service benefits that may result from reallocating a channel from one community to another." See Change of Community MO&O, 5 FCC Rcd at 7097. Therefore, although petitioner has provided some information in its proposal concerning increases in service, it is requested that petitioner provide more specific data regarding areas and populations which will gain and lose service if Channel 265C2 is allotted to Berlin. The study should also indicate the number of reception services which are available within both the loss and gain areas.

4. Channel 265C2 can be allotted to Berlin in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.1 kilometers (6.9 miles) north of the community.<sup>3</sup> The site restriction imposed on Channel 265C2 at Berlin does not obviate the short-spacings to Station CBF-FM, Channel 265C1, Montreal, Quebec, and to Station CBF10F, Channel 266B, Sherbrook, Quebec, Canada. Therefore, we have sought Canadian concurrence in the allotment of Channel 265C2 at Berlin as a specially negotiated short-spaced limited allotment since Berlin is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with the provisions of Section 1.420(i) of

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<sup>2</sup> See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870, 4874 (1989) ("Community of License"), recon. granted in part, 5 FCC Rcd 7094 (1990) ("Change of Community MO&O").

<sup>3</sup> The coordinates for Channel 265C2 are 44-18-15 NL and 72-37-24 WL.

the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 265C2 at Berlin, Vermont.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

| <u>City</u>         | <u>Channel No.</u> |                 |
|---------------------|--------------------|-----------------|
|                     | <u>Present</u>     | <u>Proposed</u> |
| Middlebury, Vermont | 265A               | --              |
| Berlin, Vermont     | --                 | 265C2           |

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before July 13, 1998, and reply comments on or before July 28, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, DC 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Anthony A. Neri, President  
Dynamite Radio, Inc.  
74 Exchange Street  
Middlebury, Vermont 05753  
(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review

by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed

comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, DC 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, NW, Washington, DC.